

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CHARTER COMMUNICATIONS VI, LLC ^{1/}

Employer

and

Case 9-UD-330

SARAH JANE LEWIS, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 369

Union

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer provides cable television and internet services to customers in South Central Kentucky from its Somerset System facilities where it employs approximately 68 employees in the current bargaining unit represented by the Union. On August 14, 2002, the Petitioner filed a petition with the National Labor Relations Board under Section 9(e) of the National Labor Relations Act seeking an election to rescind the Union's authority to require under its collective-bargaining agreement with the Employer that employees make certain lawful payment to the Union in order to retain their employment.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer and Union filed briefs with me. ^{2/} Contrary to the Employer and the

^{1/} The Employer's name appears as amended at the hearing.

^{2/} At the hearing and in its brief, the Union asserts that the Employer should not be a party in this matter and should not have standing to participate in the hearing on the ground that a union deauthorization petition "does not lawfully affect the company, because the only thing at stake (the union security clause) is between the union and the employees." The Union further claims that a new hearing should be conducted without the participation of the Employer.

Section 101.30 of the Board's Rules and Regulations specifically provides that an employer is to be served with the notice of hearing in cases involving a union deauthorization petition and the hearing is to be conducted under the same procedures as other representation hearings. Accordingly, I find that the Employer is a proper party in this matter and is entitled to fully participate in the hearing at all stages of the proceeding.

Petitioner, the Union contends that the petition must be dismissed because the Petitioner is employed in a job position, plant assistant, that is excluded from the bargaining unit and she is, therefore, ineligible to file the petition in this matter. ^{3/}

I have carefully considered the evidence and the arguments presented by the parties on the issue of the Petitioner's eligibility to file the petition and have concluded, as discussed below, that the Petitioner, as plant assistant, is a nonsupervisory employee of the Employer who was, at all times material, treated by the parties as a bargaining unit employee. Petitioner, therefore, has standing to file the petition. Accordingly, I have directed an election on the question of rescinding the Union's authority to maintain a union-security agreement in the current collective-bargaining contract.

To provide a context for my discussion of the issues, I will first provide as background, the requirements for the filing and processing of a union deauthorization petition, an overview of the Employer's operations, and the history of the development of the current description of the bargaining unit. I will then present, in detail, the facts and reasoning concerning the eligibility of the Petitioner that supports my conclusions on that issue.

I. BACKGROUND

A. Requirements for Filing and Processing of a Union Deauthorization Petition

Under Section 9(e), a UD election is conducted among the employees in the bargaining unit covered by the collective-bargaining agreement between the employer and the union. See, *Rose Metal Products, Inc.*, 289 NLRB 1153 (1988). As this section defines the unit only once, both for petitioning and for balloting purposes, the Board does not define the unit for election in a deauthorization proceeding. See, *Illinois School Bus Co.*, 231 NLRB 1 (1977). In *Illinois School Bus*, the Board further noted that the unit in these cases has been previously established either through Board

^{3/} At the hearing and in its brief, the Union contends that it should have been permitted to explore and present evidence at the hearing regarding alleged "Employer taint" of the petition. The hearing officer advised the Union that the sufficiency of the showing of interest is an administrative matter, that allegations of improper conduct in obtaining the showing of interest may not be litigated at a representation hearing and that he would not permit the parties to ask questions pertaining to the showing of interest. The Board's *Casehandling Manual, Part Two, Representation Proceedings* specifically states at Section 11184.1 that "if a party seeks at the hearing to introduce evidence of alleged fraud, misconduct, supervisory taint, or forgery in obtaining the showing of interest, the line of questioning should not be permitted." Accordingly, the hearing officer's ruling in this regard is hereby affirmed.

The casehandling manual at Section 11028.1 specifically provides that the party alleging taint of the showing of interest must present its evidence of same to the Regional Director in a timely manner for an administrative investigation during the preliminary investigation of the petition. I note that the Union has not presented any direct evidence to me of Employer assistance, interference or taint of the petition.

procedures or by voluntary agreement between the employer and the union, and that as a matter of settled law, the unit for the election must be co-extensive with the contractual unit, even where some employees in the unit may not otherwise be subject to the Board's jurisdiction.

B. The Employer's Operations

The Employer's Somerset System is comprised of two main offices, located in Somerset and Corbin, Kentucky, and approximately eight additional one-person offices in outlying areas. Plant Manager Lynn McMahan and General Manager Brenda Rouse are located at the main office in Somerset. McMahan oversees the Employer's technical operations while Rouse is in charge of the Employer's business operations. The Employer's technicians and warehouse employees including the wip (work-in-progress) clerks and dispatchers report to first line supervisors who, in turn, report to McMahan. In addition, several employees report directly to McMahan including the administrative assistant, the project coordinator and the plant assistant. ^{4/}

C. The History of Modifications to the Appropriate Bargaining Unit

As shown below, the position of plant assistant was never specifically set forth in the unit description in either the certified unit or the contractual unit.

I take administrative notice that in Case 9-RC-17571, I issued a Certification of Representative on October 11, 2001, to the Union as the exclusive collective-bargaining representative for employees in the following unit:

All employees employed by the Joint Employers, including installer, installer repair technicians, service technicians, system technicians, system technician lead, data services technicians, warehouse persons, warehouse converter technicians, warehouse leads, CLI technicians, headend technicians, dispatchers, quality assurance technicians, customer service representatives, customer service representative lead, wip clerk, administrative assistant, data processing coordinator, collections coordinator, and project coordinator working at or out of its Somerset, Russell Springs, Monticello, Corbin, Manchester, Columbia, Whitley City, Greensburg and Cumberland facilities in the Commonwealth of Kentucky and surrounding communities of Kentucky, and Jellico, Tennessee, but excluding chief technicians, office manager, technical project manager, installation supervisor, marketing administrator, broadband services engineer, general manager, confidential employees, managerial employees, and all professional employees, guards and supervisors as defined in the Act.

^{4/} The administrative assistant and the project coordinator are specifically included in the bargaining unit.

Thereafter, on June 17, 2002, the Employer and the Union entered into a collective bargaining agreement covering the unit which is effective by its terms from June 17, 2002 to June 16, 2004. The contract describes the employees included and excluded from the bargaining unit. Article I, paragraph A, describes the employees included in the unit as:

All full-time and regular part-time (working less than 32 hours per week) installers, installer repair technicians, service technicians, system technicians, system technician leads, data services technicians, warehouse persons, warehouse converter technicians, warehouse leads, CLI technicians, headend technicians, dispatchers, quality assurance technicians, customer service representatives, customer service representative leads, cable/broadband services coordinators, wip clerks, administrative assistants, data processing coordinators, collections coordinators, and project coordinators working at or out of its Somerset, Russell Springs, Monticello, Liberty, Corbin, Manchester, Columbia, Whitley City, Greensburg and Cumberland facilities in the Commonwealth of Kentucky and surrounding communities of Kentucky, and Jellico, Tennessee.

Paragraph B of Article I, defines the employees who are excluded from the bargaining unit as follows:

All other employees, including but not limited to, chief technicians, office managers, technical project managers, installation supervisors, marketing administrators, broadband services engineers, general managers, confidential employees, managerial employees, and all professional employees, guards and supervisors, as defined in the Act, are expressly excluded from the bargaining unit covered by this Agreement.

However, although the plant assistant position was not set forth in any unit description, as shown below, Petitioner was treated by both parties as included in the unit.

II. THE ELIGIBILITY OF THE PETITIONER

A. Lewis' Job Duties and Benefits

Lewis has been employed in the job classification of plant assistant at the Employer's main office in Somerset, Kentucky since her hire in August 2001.^{5/} She is the only employee employed in this classification and she reports directly to Plant Manager Lynn McMahan.

^{5/} The record evidence discloses that the job description for this position was prepared November 30, 1998 and was last revised on June 15, 1999.

The record reflects that Lewis has a variety of duties. She handles the Employer's accounts payable and is responsible for tracking customer and vendor invoices and purchase orders, filing invoices and matching up the invoices with the purchase orders when they come in and sending them out to be paid. In addition, Lewis provides technical support to the technicians, including ordering their uniforms, gas cards and the maintenance cards for their vehicles. Lewis types memos for McMahan, faxes technical documents to the outlying offices, sets up appointments and makes travel arrangements for McMahan, distributes the daily mail at the main office, and does special projects as assigned by McMahan such as researching the amount of money spent by the Employer on a particular project. Lewis is currently paid \$9.64 an hour, which is similar to other unit employees' wage rates, and receives the same benefits as the other employees in the bargaining unit.

B. Lewis' Participation in Board Election

The record reflects that Lewis' name was included by the Employer on the election eligibility list and that she cast an unchallenged ballot in the election. Lewis' name, together with her job classification as plant assistant, was subsequently included on a list of bargaining unit employees and their job classifications that the Employer provided to the Union on December 6, 2001 during the course of collective-bargaining negotiations.

C. Plant Assistant Position is Treated by the Parties as Included in the Unit

McMahan, who attended all of the contract bargaining sessions for the Employer, and Bill Callahan, the Union's Business Representative, who attended all of the contract bargaining sessions for the Union, testified that the position of plant assistant was not brought up or discussed by the parties during contract negotiations. Although the Employer drafted the recognition language that was accepted by the Union and incorporated into the contract, McMahan testified that he did not know why the plant assistant position was not listed among the classifications included in the bargaining unit.

D. Parties' Post Contract Treatment of Lewis

Documents in evidence show, however, that the Employer has always considered Lewis a member of the bargaining unit. For instance, Lewis' original personnel form was modified by the Employer on July 16, 2002, to indicate that she was represented by the Union.^{6/} Further, Lewis received the \$150 signing bonus and 1.5 percent pay increase all other unit employees received following contract ratification. At no time was Lewis told by anyone in management that she was not included in the bargaining unit.

^{6/} The personnel form of the warehouse leadman, whose inclusion in the unit is not disputed, was similarly changed on July 16, 2002 to show that he was represented by the Union.

Callahan testified that he first became aware that the plant assistant position was not listed in the contractual recognition clause at the June 15, 2002 employee ratification meeting attended by Lewis when Lewis pointed that out to him. He testified that because he did not have an explanation for why her job position was not listed in the recognition clause, he permitted Lewis to vote on contract ratification. The Union, however, never sought to clarify with the Employer whether Lewis was included in the unit and continued to mail her the same letters that were sent to other unit members, including letters dated June 25 and July 26, 2002, demanding that she join the Union pursuant to the contractual union security provision. The record evidence reflects that Lewis received both of these letters before she filed the instant petition.

E. Petitioner's Attempts to Tender Union Dues

The record reflects that the Union, pursuant to the union security clause in the contract, sent Lewis at least two letters demanding that she become a member and pay union dues. In response to these letters, Lewis sent a check dated August 15, 2002 to the Union for payment of her union dues. The check was not cashed by the Union because Lewis had not enclosed a signed "Obligation of I.B.E.W." form with her check. About September 2, 2002, the Union sent Lewis another copy of the form and requested that she sign and return it. Callahan testified that he again reviewed the situation regarding Lewis' inclusion in the unit after the instant petition was filed, and determined she was not a bargaining unit employee "per the company definition." Callahan states that he then instructed that Lewis' check be returned to her with a letter advising her that she was not a bargaining unit member because her job classification was not listed in the contract. Callahan also testified that he ordered the cessation of mailing Lewis any further correspondence that the Union was sending to other unit employees. The letter to Lewis returning her check was dated September 16, 2002. ^{7/}

III. ANALYSIS AND CONCLUSION

Although the Employer concedes that the plant assistant position is not listed among the job classifications in the contractual recognition clause, the Employer argues that Lewis is properly part of the bargaining unit because her job duties are essentially the same as the job duties of the administrative assistant, a job position that is included in the unit description. On the other hand, the Union points out that the position of administrative assistant is, in fact, a different job from that of the plant assistant and that each position has its own distinct job description. The Union further contends that because the Employer drafted the description of the bargaining unit as it appears in the contract, and because the description is not ambiguous, the Employer should not now be allowed to define the unit differently to the detriment of the Union.

I find none of the arguments proffered by the parties in support of their positions is dispositive of the issue of the Petitioner's status. The Board has consistently held

^{7/} I note that this letter was mailed after the petition was filed and 3 days before the scheduled hearing in this matter.

that a unit for a deauthorization election must be co-extensive with the contractual unit. However, the Board has found that this precept must be construed to mean that all employees that the parties have included in the unit are permitted to vote in the election. See, *Illinois School Bus Co.*, supra, and *Romac Containers*, 190 NLRB 238 (1971). In both of these cases, the Board included employees in the unit for purposes of a UD election even though these employees may not have been found eligible to participate in an initial election for representation because the parties agreed these employees were covered by the contract and subject to the union security provisions of that contract. Thus, the Board found that bus drivers who spent the great majority of their time providing services for public school systems in *Illinois School Bus* and summer students in *Romac Containers* were eligible to vote in a UD election.

I am not unmindful of the fact that Lewis' job classification was not specifically included in the certified unit description and is not included in the contractual unit description and therefore arguably, is not included in the unit. I am also aware that unlike the situations in *Romac Containers* and *Illinois School Bus*, there is no evidence of any formal agreement between the parties that includes the plant assistant classification in the unit. On the other hand, there is no evidence of any formal agreement specifically excluding this classification from the unit and I find, based on the parties' conduct, there was at least a tacit agreement by the parties to include the plant assistant in the unit. Here, the record evidence establishes that both parties made it clear by their actions that they were including this position in the unit. Thus, the Employer treated Lewis as a unit employee by including her name with her job classification on a list of all unit employees that it gave to the Union during contract negotiations and by granting to her the same contractual benefits (e.g. a wage increase and bonus), accorded to the other employees in the unit. The Union, for its part, never questioned the Employer's inclusion of Lewis' name on the list of unit employees and allowed Lewis to vote on contract ratification even though it was then aware that the plant assistant classification was not set forth in the contractual unit. Following the ratification vote, the Union continued to send Lewis the mailings sent to all unit employees, including at least two letters demanding that she become a union member and remit union dues, which she did, as required by the union security provision in the contract. It was not until after she filed the instant petition that the Union returned her check for the required union dues and took the position that Lewis was not in the bargaining unit.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in the briefs of the Employer and the Union, I find that at all material times, the Employer and the Union included the plant assistant position in the bargaining unit covered by the contract. Lewis was, at least at the time she filed the petition, a member of the bargaining unit. She is, therefore, eligible to file the instant petition.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The following employees of the Employer constitute the recognized bargaining unit covered by the terms of the current collective-bargaining agreement:

All full-time and regular part-time (working less than 32 hours per week) installers, installer repair technicians, service technicians, system technicians, system technician leads, data services technicians, warehouse persons, warehouse converter technicians, warehouse leads, CLI technicians, headend technicians, dispatchers, quality assurance technicians, customer service representatives, customer service representative leads, cable/broadband services coordinators, wip clerks, administrative assistants, data processing coordinators, collections coordinators, and project coordinators working at or out of its Somerset, Russell Springs, Monticello, Liberty, Corbin, Manchester, Columbia, Whitley City, Greensburg and Cumberland facilities in the Commonwealth of Kentucky and surrounding communities of Kentucky, and Jellico, Tennessee, expressly excluding all other employees, including but not limited to, chief technicians, office managers, technical project managers, installation supervisors, marketing administrators, broadband services engineers, general managers, confidential employees, managerial employees and all professional employees, guards and supervisors, as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to rescind the Union's authority to require under its collective-bargaining agreement with the Employer that employees in the bargaining unit make certain lawful payments to the Union in order to retain their jobs. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **January 7, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **three** copies, unless the list is submitted by facsimile, in which case no

copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **January 14, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 31st day of December 2002.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

324-4060-2500